IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 93 OF 1999

1. M/s. Balaji Constructions Co.,
   Registered at Mumbai, BA-58111
   dated 20-9-1993 under Indian
   Partnership Act, 1932, represented
   by their partner, Mr. Hemant
   Radhakrishna Sapale, carrying on
   business at Parvati Niwas, Mahant
   Road Extension, Vile-Parle(East),
   Mumbai - 400 057.

2. Mr. Hemant Radhakrishna Sapale,

3. Mrs. Shilpa Hemant Sapale,
   Both of Mumbai, Indian Inhabitants,
   Partners of M/s Balaji Constructions
   Co., and residing at "Parvati Niwas",
   3rd Floor, Mahant Road Extension,
   Vile Parle(East), Mumbai - 400 057. ... Appellants

versus

1. Mrs. Lira Siraj Shaikh, w/o Mr. Siraj
   Shaikh, occupation, housewife,
   residing at F-5, Sonali Apartments,
   Tonca, Caranzalem, Panaji, Goa.

2. Mr. Siraj Shaikh, major, occupation
   business, resident of F-5, Sonali
   Apartments, Tonca Caranzalem,
   Panaji, and carrying on business at
   "Aleluia Menezes Building", opp.
   "MES Inspection Bungalow",
   Altinho, Panaji, Goa - 403 001.

3. Mrs. Maria Elvina Das Neves Ferreira Trindade, major, residing at Rua Ascensao Gunimaraes, No.161, resident of D.T.O. Loule, Portugal.

4. Mr. Humberto Jorge Candeias Castelo Branco Trindade, major, residing at Rua Ascensao Gunimaraes, No.161, resident of D.T.O., Loule, Portugal.

5. Mrs. Maria Ruth Das Neves Ferreira Reis, major, residing at Rua Manuel Ferreira de Andrade, No. 3-5 Dt., Lisboa, Portugal.

6. Mr. Lesseps Jose Antonio Lourenco Reis, major, residing at Rua Manuel Ferreira de Andrade, No. 3-5 Dtd., Lisboa, Portugal.

7. Mrs. Maria Raquel Das Neves Ferreira Moniz Lima, major, residing at Urbanizacao Do Salqueiral, No.103, C4D Guimaraes, Portugal.

8. Mr. Joao Paulo De Moura Moniz Lima, major, residing at Urbanizacao Do Salqueiral, No.103 C4D Guimaraes, Portugal.

9. Mrs. Maria Manuela Das Neves Ferreira Medeiros, major, residing at Rua Damiao de Goia No.45-5o, DTO Alges, Portugal.

10. Mr. Carlos Alberto Marques Laranjo Medeiros, major, residing at Rua Damiao De Gois No.45-0o, DTO Alges, Portugal.

11. Mrs. Maria Augusta Das Neves Ferreira, major, residing at Rua Sebastiao Saraiva Lima No.66-1o, DTO Lisboa, Portugal.

12. Mr. Henrique Albuquerque Lourenco Moreira, major, residing at Rua D. Aleixo Cortereal No.394 r/o - D Lisboa, Portugal.

13. Mr. Joao Pedro Ferreira Moreira, major, residing at Rua D. Aleixo Cortereal No.394 r/o - D Lisboa, Portugal.

14. Mr. Luis Filip Ferreira Moreira, major, residing at Rua D. Aleixo Cortereal No.394 r/o D Lisboa, Portugal.

15. Ms. Sonia Luisa Ferreira Moreira, major, residing at Rua D. Aleixo Cortereal No.394 r/o Lisboa, Portugal.

16. Mrs. Cristalina Ferreira,

17. Mr. Santanio Ferreira,

18. Mr. Piedade Ferreira,

19. Mr. Filipe Ferreira,

All the Respondents at sr. nos. 16, 17, 18 and 19 are major and residing at Chalta No.72, City Survey No. 133, Borda, Margao, Goa. ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Ms. Kamaxi Sambari, Advocate for the Appellants.

None for the respondents.

CORAM : R. M. LODHA &
N. A. BRITTO, JJ.

DATE : 20TH SEPTEMBER, 2005.

ORAL JUDGMENT(PER R. M. LODHA, J.)

This First Appeal is at the instance of the Original Plaintiffs. Their suit came to be dismissed by the learned Civil Judge, Senior Division, Margao, being hit by the provisions contained in Section 69(2) of the Indian Partnership Act,1932.

2. Mr. S. D. Lotlikar, the learned Senior Counsel for the Appellants strenously urged that there was nothing on record to indicate that the agreements dated 3-9-1990 and 2-2-1991, of which specific performance is sought, were entered into during the ordinary course of business of the first Plaintiff-firm with the Defendant Nos.1 and 2 and, therefore, bar of Section 69(2) of the Indian Partnership Act, 1932 was not attracted. The learned Senior Counsel placed reliance on the Judgment of the Supreme Court in the case of **M/s. Haldiram Bhujiawala and another** v. **M/s. Anand Kumar Deepak Kumar and another**(AIR 2000 SC 1287).

3. The Appellants(hereinafter referred to as "the Plaintiffs") filed a suit against the Respondents(hereinafter referred to as "the Defendants") seeking specific performance of the agreements dated 3-9-1990 and 2-2-1991, in the alternative claim for damages and other incidental reliefs. In the light of the controversy involved in this appeal it is not necessary to refer to the facts in details. Suffice it to say that the Plaintiffs averred that the firm(first Plaintiff) was registered under the Indian Partnership Act, 1932 at Bombay. The details of the two

agreements dated 3-9-1990 and 2-2-1991 were given and it was averred that the Plaintiffs had so far paid a consideration of Rs.50,000/- as part payment of the price of the suit property. The Plaintiffs averred that the Defendant Nos.1 and 2 failed to obtain the requisite permission from the Reserve Bank of India for the sale of the suit property and do necessary acts for the sale. The Plaintiffs claimed that in the event the specific performance as prayed for was not being granted, the damages in the sum of Rs.50,00,000/- being 10% profit in the building project proposed to be undertaken on the site of the suit property, be granted.

4. The Defendant Nos.1 and 2 and the Defendant Nos. 3 to 16 filed separate Written Statements. They raised the objection that the first Plaintiff firm was not registered as a partnership firm and the Plaintiff Nos.2 and 3 were not registered partners of the first Plaintiff-firm on the date of filing of the suit and, therefore, the suit was hit by Section 69(2) of the Indian Partnership Act, 1932.

5. In the light of the objection raised by the Defendants that the suit was hit by the provisions contained in Section 69(2) of the Indian Partnership Act, 1932 the trial Court heard the parties on the said question and by the impugned Judgment dated 10-6-1999 held that since the firm was not registered on the date of the filing of the suit, the provisions of Section 69(2) of the Indian Partnership Act, 1932 were attracted and the suit was liable to be dismissed and was dismissed accordingly.

6. The learned Senior Counsel for the Appellants/Original Plaintiffs did not dispute the position that on the date of the filing of the suit i.e. 30-8-1993, the first Plaintiff-firm was not registered nor the second and the third Plaintiffs were shown as partners in the Register of firms. He, however, submitted that on 19-8-1993(before the suit was filed) the application for registration of the first Plaintiff-firm was made and during the pendency of suit on 20-9-1993 the first Plaintiff-firm was registered.

7. That on the date of the filing of the suit, the first Plaintiff-firm was not registered, thus, is not in dispute.

8. In **M/s Shreeram Finance Corporation** v. **Yasin Khan and others** (AIR 1989 SC 1769) the Supreme Court held that if on the date of the filing of the suit by and on behalf of a firm against any third party, if the firm is not registered and the persons suing have not been shown in the Register of the Firms as partners in the firm, the suit was hit by the provisions of Sub-Section (2) of Section 69. In paragraph 6 of the report the Supreme Court held thus:-

> "6. In the present case the suit filed by the appellants is clearly hit by the provisions of sub-sec. (2) of S.69 of the said Partnership Act, as on the date when the suit was filed, two of the partners shown as partners as per the relevant entries in the Register of Firms were not, in fact, partners, one new partner had come in and two minors had been admitted to the benefit of the partnership firm regarding which no notice was given to the Registrar of Firms. Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Register of Firms. The result is that the suit was not maintainable in view of the provisions of sub-sec.(2) of S.69 of the said Partnership Act

> and the view taken by the Trial Court and confirmed by the High Court in this connection is correct. Although the plaint was amended on a later date that cannot save the suit. Reference has been made to some decisions in the judgment of the Trial Court; however, we do not find it necessary to refer to any of them as the position in law, in our opinion, is clear on a plain reading of sub-sec.(2) of S.69 of the said Partnership Act".

9. It is true that the view taken in **M/s. Shreeram Finance Corporation**(supra) was doubted in the case of **Raptakos Brett & Co. Ltd.** v. **Ganesh Property,**(1998) 7 SCC 184. However, the Supreme Court thought it fit not to express any final opinion about its earlier decision in **M/s. Shreeram Finance Corporation**(supra). In **Raptakos Brett & Co. Ltd.**, this is what the Supreme Court observed:-

> "29. We, prima facie, find substance in what is contended by Dr. Singhvi for the respondent. It is obvious that even if the suit is filed by an unregistered partnership firm against a third party and is treated to be incompetent as

per Section 69 sub-section (2) of the Partnership Act, if pending the suit before a decree is obtained, the plaintiff puts its house in order and gets itself registered, the defect in the earlier filing which even though may result in treating the original suit as stillborn, would no longer survive if the suit is treated to be deemed to be instituted on the date on which registration is obtained. If such an approach is adopted, no real harm would be caused to either side. As rightly submitted by Dr. Singhvi, Order 7 Rule 13 of the CPC would permit the filing of a fresh suit on the same cause of action and if the earlier suit is permitted to be continued, it would continue in the old number and the parties to the litigation would be able to get their claim adjudicated on merits earlier while on the other hand, if such subsequent registration is not held to be of any avail, all that would happen is that a fresh suit can be filed immediately after such registration, and then it will bear a new number of a subsequent year. That would further delay the adjudicatory process of the court as such a new suit would take years before it gets ready for trial and the parties will be further deprived of an opportunity to get their disputes adjudicated on merits at the earliest and the

arrears of cases pending in the court would go on mounting. It is axiomatic to say that as a result of protracted litigation spread over tiers and tiers of court proceedings in the hierarchy, the ultimate result before the highest court would leave both the parties completely frustrated and financially drained off. To borrow the analogy from an English poem with the caption "death the leveller" with appropriate modifications, the situation emerging in such cases can be visualised as under: "upon final court's purple altar see how victor victim bleed". All these considerations in an appropriate case may require a relook at the decision of the two-Member Bench of this Court in Shreeram Finance. However, as we have noted earlier, on the facts of the present case, it is not necessary for us to express any final opinion on this question or to direct reference to a larger Bench for reconsidering the aforesaid decision. With these observations, we bring down the curtains on this controversy. Point 2, therefore, is answered by observing that it is not necessary on the facts of the present case in the light of our decision on the first point to decide this point one way or the other. Point 2 is, therefore, left

> undecided as not surviving for consideration".

10. Insofar as we are concerned, the Judgment of the Supreme Court in the case of **M/s. Shreeram Finance Corporation**(supra) holds the field and binds us. In view of the decision in that case, the first Plaintiff-firm being not registered on the date of the filing of the suit, it has to be held and rightly so held by the trial Court that it was liable to be dismissed in view of Section 69(2) of the Indian Partnership Act, 1932.

11. The learned Senior Counsel for the Appellants, however, urged that the agreements, of which specific performance is sought in the suit, were not entered into by the firm with the Defendants in the course of business dealings by the first Plaintiff-firm and as such bar of Section 69(2) was not attracted. The learned Senior Counsel sought to place reliance on the Judgment of the Supreme Court in **M/s. Haldiram Bhujiawala**(supra).

12. In **M/s. Haldiram Bhujiawala**(supra) the Supreme Court observed thus:-

"24. The further and additional but equally important aspect which has to be made clear is that - the contract by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with the third party-defendant but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiff's firm with such third party-defendant".

25. It will also be seen that the present defendants who are sued by the plaintiff-firm are third parties to the 1st plaintiff firm. Section 2(d) of the Act defines 'third parties' as persons who are not partners of the firm. The defendants in the present case are also third parties to the contract of dissolution dated 16-11-74. Their mother, Kamla Devi was no doubt a party to the contract of dissolution. The defendants are only claiming a right said to have accrued to their mother under the said contract dated 16-11-74 and then to the defendants. In fact, the said contract of dissolution is not a contract to which even the present 1st plaintiff firm or its partners or the 2nd plaintiff were parties. Their father Moolchand was a party and his right to the trade mark devolved in plaintiffs. The real crux of the question is that the legislature when it used the words "arising out of a contract" in Section 69(2), it is referring to a contract entered into in course of business transactions by the unregistered plaintiff firm with its customers-defendants and the idea is

> to protect those in commerce who deal with such a partnership firm in business. Such third parties who deal with the partners ought to be enabled to know what the names of the partners of the firm are before they deal with them in business".

13. It is not mistaken supposition in law that the right that is sought to be enforced by the unregistered firm must be a right arising out of the contract with the third party in the course of business transactions. Adverting to the averments made in the plaint, it would be seen that there is no averment made by the Plaintiffs that the agreements were not entered into the ordinary course of business dealings of the first Plaintiff-firm. Rather a close scan of the plaint shows that the subject agreements were in the course of the business dealings of the first Plaintiff-firm and the Plaintiffs have set up the case that due to non performance of the contracts by the Defendants, the first Plaintiff-firm suffered loss of business profit in the proposed building project. In this view of the matter, we find no merit in the submission of the learned Senior Counsel for the Appellants that the question whether the subject contracts were entered into during the course of business dealings of the first Plaintiff-firm ought to have been decided

after recording the evidence. As we have indicated above, from the facts averred in the plaint, it cannot be said that the subject contracts were not entered into during the course of business dealings. The impugned Judgment does not suffer from any infirmity.

14. First Appeal is, accordingly, dismissed with no order as to costs since the other side has not chosen to appear.

R. M. LODHA, J.

N. A. BRITTO, J.

RD.